

At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on August 26, 2008

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN**

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**DISCOVER BANK,**

Plaintiff,

**-against-**

**DECISION/ORDER  
Index # 1085/02  
RJI # 52-28011/08**

**DANIEL B. MILLER,**

Defendants.

-----X  
**Present: Hon. Mark M. Meddaugh,  
Acting Justice, Supreme Court**

**Appearances: Upton, Cohen & Slamowitz, LLP  
Attorneys for the Plaintiff  
199 Crossways Park Drive  
Woodbury, NY 11797**

**Schlanger & Schlanger, LLP  
By: Daniel A. Schlanger, Esq.  
1025 Westchester Avenue, Suite 108  
White Plains, NY 10604**

**MEDDAUGH, J.:**

The Defendant has moved for an order to vacate the default judgment, pursuant to CPLR 5014(a)(4), on the grounds that personal jurisdiction was not obtained over him. The motion papers contained a CPLR 2214 notice requiring that answering papers be served at least seven days before the return date the motion, which was August 26, 2008. The Plaintiff's answering papers were not served until August 22, 2008, and the Defendant's counsel indicated that he only received the opposing counsel's affirmation on Monday, August 25, 2006, less than 24 hours prior to the return date. The Defendant timely submitted his attorney's reply affirmation, which

was filed on the return date of the motion. The Court shall consider the Plaintiff's late filed in this matter (CPLR §2004) in order to fully address the address the issues raised in this motion.

The Defendant provided a copy of the affidavit of service, which indicated that the Defendant was served by nail and mail service on May 14, 2003. The Defendant asserts that he has not lived at 464 Dahlia Road, Livingston Manor, New York, the address at which service was purportedly effected, since 2001. He also provided an affidavit from his landlord indicating that he was living a different address (23 Pearl Street, Livingston Manor) from May of 2002 until July of 2003. The Defendant also provided a on the dates of service, and he also provided a "Notice to Tenant" dated June 9, 2003, seeking payment for back rent for the 23 Pearl Street residence.

The Defendant asserts that his first notice of this action occurred when his bank account was restrained by the Plaintiff in December of 2007.

The Plaintiff's counsel does not dispute the facts in Defendant's motion papers, but she merely asserts that the Plaintiff would consent to vacating the judgment, releasing all accounts restrained on the basis of the judgment, and restoring the case to the Court's calendar, but only on the condition that the Defendant agrees to waive any defenses based upon a lack of personal jurisdiction.

The Defendant refuses to waive its defenses based on a lack of personal jurisdiction. The Defendant also argues that the Plaintiff has failed to introduce any supporting documentation to support the amount that Plaintiff claims the Defendant owes. Furthermore, it is alleged that once this action is dismissed, the Plaintiff will be barred from re-commencing same, arguing the credit card agreement contains a Delaware choice of law provision, which provides for a three-year

statute of limitations. The Defendant asserts that the Plaintiffs offer to “settle” was no offer at all, since the Plaintiff was not offering anything that the Defendant was not already entitled to receive as a matter of law.

### Conclusions of Law

Where a motion to vacate a default judgment is based on a failure of service, leading to a lack of personal jurisdiction, the issue of a meritorious defense is not material and the default will be unconditionally vacated in the absence of jurisdiction (*Electric Ins. Co. v. Grajower*, 256 AD2d 833, 681 NYS2d 667 [3<sup>rd</sup> Dept., 1998]), *European American Bank & Trust Co. v. Serota*, 242 AD2d 363, 661 NYS2d 282 [2<sup>nd</sup> Dept., 1997], *New York State Higher Educ. Services Corp. v. Adams*, 173 Misc2d 283, 660 NYS2d 824 [Sup.Ct., Albany Co., 1997]).

Section 308[4] of the CPLR provides that service may be effected by affixing the summons and complaint to the "door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence."

Where a Defendant asserts in an affidavit that service was effected at an address at which the Defendant no longer resides, it is sufficient to warrant a hearing as to whether the Plaintiff's service was proper pursuant to CPLR 308(4) was proper (*European American Bank & Trust Co. v. Serota, supra.*). At a traverse hearing, it is the Plaintiff's burden to establish jurisdiction over the Defendant by a preponderance of the evidence ( *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 AD2d 135, 502 NYS2d 479 [2<sup>nd</sup> Dept., 1986]).


The Defendant has offered un rebutted proof that the place at which he was purportedly served pursuant to CPLR 308(2) was neither his actual dwelling nor his usual place of abode

at the time of service. The Plaintiff failed to offer any evidence to refute this proof, and the default judgment entered against the Defendant must be vacated for lack of personal jurisdiction, and the complaint against the Defendant dismissed (*Ben-Amram v. Hershowitz*, 14 AD3d 638, 789 NYS2d 313 [2<sup>nd</sup> Dept., 2005]).

Wherefore, based on the foregoing, the Defendant's motion to vacate the default judgment entered against the Defendant in this action is granted, the Plaintiff is directed to immediately releasing all accounts restrained on the basis of the judgment, and the complaint herein is dismissed.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: September 22, 2008  
Monticello, New York

ENTER:   
HON. MARK M. MEDDAUGH  
Acting J.S.C.

Papers Considered:

1. Order to Show Cause, dated July 22, 2008
2. Affirmation of Daniel A. Schlanger, Esq., affirmed on July 21, 2008
3. Affidavit of Daniel B. Miller, sworn to March 3, 2008
4. Affirmation of Crystal S. A. Scott, Esq., sworn to August 22, 2008
5. Reply Affirmation of Daniel A. Schlanger, Esq., affirmed on August 25, 2008